IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 18899 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE ANANT S.DAVE

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JAGDISH @ KABUTAR SIMONBHAI MAKWAN - Petitioner(s)
Versus
THE STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :
MR HR PRAJAPATI for Petitioner(s) : 1,MR MR PRAJAPATI for Petitioner(s) : 1,
RULE SERVED BY DS for Respondent(s) : 1 - 2.
Mrs. Hansa Punani, ld. A.G.P. for Respondent: 3

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CORAM : HONOURABLE MR.JUSTICE ANANT S.DAVE

Date : 25/10/2005

ORAL JUDGMENT

1. The detenue, who is detained under the provisions of Gujarat Prevention of Anti-social Activities Act, 1985 (for short, 'the PASA Act') branded as 'Bootlegger' within the meaning of section 2(b) of the PASA Act, vide order dated 31.08.2005 passed by the District Magistrate, Kheda District, Nadiad has filed this petition under

Article 226 of the Constitution of India to declare the order of detention as illegal, arbitrary and invalid on the ground that it suffers from non-application of mind and violative of provisions of Article 14, 19, 21 and 22 of the Constitution of India.

2. The order of detention refers to four instances, where under the provisions of Bombay Prohibition Act for the offences punishable under Sections 66 (1) (b), 65 (a)(e), 67(a), 116b and 81 which have been registered with different Police Stations of Anand Town and Nadiad district on four different occasions against the detenue. According to the detaining authority, the above stated materials are sufficient enough to arrive at the subjective satisfaction for detaining the detenue under the provisions of PASA Act. That the activities of the detenue is prejudicial and the same is likely to result into the disturbance of public health and public order, and therefore, considering the relevant documents and materials the detenue was detained in exercise of powers under Sub-section

(2) of Section 3 of the PASA Act. Apart from the crime registered cases, as mentioned in the detention order does not reflect whether any relevant or specific material is considered by the detaining authority.

3. The learned advocate for the petitioner Mr. H.R.Prajapati confined his arguments on the ground that the alleged offences registered against the detenue cannot be said the cause of disturbing the public order or public health or in any circumstances prejudicial and have potential to disturb the even tempo of public life and/or public health. According to him, no relevant materials did exist before the detaining authority while passing the order of detention and the subjective satisfaction arrived at by the detaining authority therefore vitiated and order of detention dated 31.08.2005 suffers from vice of non-application of mind, and therefore, required to be quashed and set aside.

4. In support of his arguments he has placed

reliance on the decision of the learned Single Judge of this Court dated 23.03.2004 rendered in Special Civil Application No.14792 of 2003 in the case of Zarinbibi w/o. Nazirmohamad Noormohamad Shaikh Vs. Commissioner of Police Baroda City and submitted that in the above mentioned case also five offences punishable under the Bombay Prohibition Act 1949 were registered against the detenue of that case and similar recitals about disturbance of public order by prejudicial activities of the petitioner was found in the order of detention. According to him after considering various decisions reported in AIR 1989 SC 491 in the case of Piyush Kantilal Mehta Vs. Commissioner of Police and JT 1989 (4) SC 177 and Rashidmiya @ Chhava Ahmedmiya Shaikh Vs. Police Commissioner, Ahmedabad and another, and the decision of the Division Bench of this Court dated 22.08.2000 passed in Letters Patent Appeal No.223/2000 in Special Civil Application No.554 of 2000 the Court has considered the relevant aspects. Therefore, according to the learned advocate for the petitioner, the ratio laid down in the above

mentioned judgment is squarely applicable in the facts of the present case. He has submitted that except the offences mentioned in the order of detention no other criminal activities attributed to the petitioner and no case of violence disturbing the public peace or public order is alleged against the detenue.

5. The learned Assistant Government Pleader Mrs. H.B.Punani has submitted that the material relied on by the detaining authority is sufficient enough to invoke the provisions and to exercise the power under the provisions of Sub-section 2 of Section 3 of the PASA Act and subjective satisfaction of the detaining authority arrived at on the basis of conscious decision cannot be said that the said satisfaction is dehors the material on record. She has also relied on the decision of the Supreme Court in the case of Kanuji Zala Vs. State of Gujarat reported at 1999 (2) GLH 415 in support of her arguments. Therefore, she has submitted that the order of detention is valid and legal and no interference is required to be called for under

Article 226 of the Constitution of India.

6. Having heard, the learned counsel for the parties and perused the record of the case, I am of the opinion that registration of three cases against the detenue under the provisions of Bombay Prohibition Act, 1949 are the only instances and the material relied on by the detaining authority simply registration of offences under the provisions of Bombay Prohibition Act, 1949 cannot be said to be disturb even tempo of public life or public order. There is no case or any other prejudicial activities of the detenue resulting into large scale violence which may disturb the public health and public order. In the case before the apex court in the case of K.S.Zala Vs. State of Gujarat (Supra) there was credible and cogent material before the detaining authority which was conscious that as a result of resorting to violence by the petitioner of that case for carrying on his bootlegging activities, even tempo of public order disturbed on some occasions. In such circumstances the apex court refused to interfere with the

exercise of power by the detaining authority. It is pertinent to mention about one more decision of the Division Bench of this High Court rendered in Letters Patent Appeal No.223 of 2000 in Special Civil Application No.554 of 2000 wherein in Paras-4 and 5 of the said judgment law laid down by the Apex Court in case of K.S.Zala Vs State of Gujarat is discussed is as under:-

> " PARA-4:- In this case of K.S.Zala Vs. State of Gujarat (Supra), the Supreme Court also considered three earlier decisions in the case of Piyush Kantilal Mehta (Supra); Omprakash (Supra); and Rashidmiya (Supra) and observed in para 4 that in none of the three cases relied upon by the learned counsel, the point whether public order can be said to have been disturbed on the ground that the activity of the detenue was harmful to the public health arose for consideration and that the detaining authority has not recorded such satisfaction; moreover in these three cases the detaining authority has referred to some incidents of beating but there was no material to show that

as a result thereof even tempo of public order was disturbed, whereas in the case before the Supreme Court in the case of K.S.Zala Vs. State of Gujarat (Supra) the detaining authority has specifically stated in the grounds of detention that selling of liquor by the petitioner and its consumption by the people of that locality was harmful to their health. It was also stated that the statements of the witnesses clearly show that as a result of violence resorted to by the petitioner even tempo of public life was disturbed in those localities for some time. That material on record clearly shows that the members of public of those localities had to run away from there or to go inside their houses and close their doors.

PARA-5:- If we examine the present case on the anvil of the test which has been applied by the Supreme Court in the case of K.S.Zala Vs. State of Gujarat (Supra), i.e. with regard to the presence of credible

material and as to how the detaining authority has made the mention against the appellant being an obstruction to the public health and public order, we find that in the instant case so far as the statements of the witnesses which were recorded with regard to unregistered cases, that ground has been rejected by the learned Single Judge himself. It is , of course, true that after narrating the authority has mentioned that the activities of the appellant were an obstacle to the public health and public order, but this bald observation cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or public health and that tempo of public life was disturbed. No observation made in any part of the judgment can be read in isolation and bereft the context. The judgment is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the judgment are

to be considered in light of the earlier observations made in para 5 where presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order, material has to be there. In the case of K.S.Zala before the Supreme Court, the detaining authority had also relied upon the statements of the witnesses so as to show that violence resorted to by the petitioner in that case had disturbed the even tempo of public life and the material on record had shown that members of the public of those localities had to run away from there and to go inside their houses and to close their houses and to close their doors. No such fact situation has been mentioned in the present case and the ground with regard to the statements of the three witnesses has been rejected by the learned Single Judge himself and it has been held that there had been violation or infringement of the

petitioner's right against such statements. In this view of the matter unregistered cases and with regard to the three incidents the material germane for the purpose of consideration of the threat to the public health and public order. Thus, the only material which remains is the registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to the public order and public health. Necessary material in this regard is totally wanting in the body of the detention order itself. In large number of cases, the Supreme Court has considered that involvement in bootlegging activities even if coupled with violence does not amount to threat to public order or public health. The mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health and

we find that after giving particulars of criminal cases, the detaining authority by including certain allegations, not supported by any credible material has simply observed that the appellant's activities were on obstacle to the public health and public order. In this view of the matter keeping in view the observations made by the Supreme Court in the case of K.S.Zala Vs. State of Gujarat (Supra) itself in paras 4 and 5, we do not find that it can be held to be a case of breach of public health and public order. Learned counsel for the appellant has also argued several other points before us, but we do not find it necessary to go into those grounds. It may be mentioned that it was not a case of breach of public order or public health and it was not argued before the learned Single Judge. Even if that be so, in such matters, the point which arises on the face of the facts of the case by the body of the order itself , which does not require further investigation of the facts can

certainly be allowed to be raised and we allow learned counsel for the appellant to raise this point and find that this point is not without substance. The impugned order passed by the learned single judge upholding the detention order therefore, cannot be said to be in consonance with the settled position of law. The detention order deserves to be quashed and set aside on this ground alone. We therefore, do not go into other grounds which were raised on behalf of the appellants."

7. In the present case, it is evident from the record that even name of un-named witness is not recorded by the detaining authority which can even a remotely connect the prejudicial activities of the detenue resulting into disturbance of the public order or public health as rightly held by the Division Bench in the above case i.e. Letters Patent Appeal No.223 of 2000 (Supra) that only material which remains is the registered criminal cases and that by itself cannot be said to be a

material for the purpose of holding that the detenue's activity had become a threat to the public order or public health. Necessary material in this regard is totally warranting in the body of the detention order. In such number of cases the Supreme Court has considered that involvement in bootlegging activities even if couple with violence does not amount to dangerous the mere mention of allegations unless they are supported by any material cannot be said to be a material germane for the purpose of arriving at the subjective satisfaction with regard to the breach of public order or public health and we find that detaining authority by including certain allegations has simply observed that the appellant's activities were an obstacle to the public health and public order. '

In view of the above, in the present case also except mentioning about pendency of complaint against the detenue vide different C.R.nos. registered with different police stations of Anand Town, Prohibition and Nadiad District, no other

credible material or cogent material did exist before the detaining authority for arriving at the subjective satisfaction that the activities of the detenue is prejudicial to the public order or public health, and, therefore, the order of detention is passed contrary to the provisions of the settled law and therefore, required to be quashed and set aside.

8. In the circumstances, the order of detention dated 31.08.2005 passed by the respondent no.2 herein, is hereby quashed and set aside

9. The detenue Jagdish @ Kabutar Simonbhai Makwan, is ordered to be set at liberty forthwith, if not require in any other offence by any other authority. Rule is made absolute to the aforesaid extent with no order as to costs. Direct Service is permitted.

(ANANT S. DAVE, J.)

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